United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1018

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel. WILLIAM PIPER,

Appellant,

-against-

PAUL J. REGAN, Chairman, NEW YORK STATE BOARD OF PAROLE, and HON. R.J. HENDERSON, Superintendent of Auburn Correctional Facility,

Appellees.

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BRIEF FOR APPELLEES

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UNITED STATES OF AMERICA ex rel. WILLIAM PIPER,

Appellant,

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Appellees.

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BRIEF FOR APPELLEES

Statement

This is an appeal from an order of the United States District Court for the Northern District of New York (Port, J.) dated April 5, 1974 denying and dismissing a petition for a writ of habeas corpus.

Questions Presented

1. May a petition for habeas corpus relief be dismissed for failure to exhaust state remedies?

2. Does a petition which alleges that the State Parole Board did not provide an inmate with a statement of reasons for

denial of parole and which refers to a parole release proceeding held prior to this Court's decision in United States ex rel. Johnson v. Chairman state a claim upon which relief can be granted?

3. Should a retroactive application of Johnson be made where it would place a burden on the Parole Board and where the Board placed reliance in good faith on the prior law that a statement of reasons was not constitutionally required?

Prior Proceedings

On or about November 6, 1973, appellant appeared before the Parole Board. He was notified that he would be held for an additional twelve months to reappear before the November, 1974 Parole Board (App., 8a)*. In a letter dated November 29, 1973, Paul J. Regan, Chairman of the New York State Board of Parole informed appellant that after an extensive review of his entire record, the Board of Parole unanimously agreed that the additional months within the institution's rehabilitative program was in his best interests and would have a deciding effect on his future (App., 12a). Thereafter, appellant initiated an Article 78 proceeding in the Supreme Court of

* Numerals in parenthesis refer to Appellant's Appendix.

Cayuga County for an order directing that he be given a better statement of the reason for the denial of parole and the application was denied (App., 11a).

In considering the petition for federal writ of habeas corpus, the District Judge noted that appellant made no mention as to when the final order dismissing the Article 78 proceeding was entered, whether the time to appeal had run out or whether an appeal was pending. Accordingly, he denied and dismissed the petition for failure to allege or demonstrate the exhaustion of available state court remedies (App., 18a). The petition was also dismissed for failure to state a claim upon which relief could be granted (App., 18a).

POINT I

THE PETITION WAS A PETITION FOR HABEAS CORPUS RELIEF AND THE DISTRICT JUDGE CORRECTLY DISMISSED IT FOR FAILURE TO SHOW THAT STATE REMEDIES HAD BEEN EXHAUSTED.

Appellant contends that the District Court erred in dismissing the petition for failure to exhaust state remedies. However, he denominated the petition as an "Application For A Writ of Habeas Corpus" and he invoked the jurisdiction of the District Court under 28 U.S.C. § 2241 which is the habeas corpus statute. In the prayer for relief, he challenged the

legality of the detention as follows:

> "Wherefore, your petitioner prays that a writ of habeas corpus issue directed to respondents or whosoever has custody of William Piper, the relator herein, commanding him to produce the body of the said William Piper before this Court so that this Court may inquire into the legality of his detention." (13a-14a)

The District Court correctly dismissed the petition for failure to allege or demonstrate exhaustion of available state remedies as required by 28 U.S.C. § 2254(c); Preiser v. Rodriguez, 411 U.S. 475 (1973). See also Mason v. Askew, 484 F. 2d 642 (5th Cir. 1973).

POINT II

A PETITION WHICH ALLEGES THAT THE PAROLE BOARD DID NOT PROVIDE AN INMATE WITH A STATEMENT OF REASONS FOR DENIAL OF PAROLE AND WHICH REFERS TO A PAROLE RELEASE PROCEEDING HELD PRIOR TO THIS COURT'S DECISION IN UNITED STATES EX REL. JOHNSON V. CHAIRMAN DOES NOT STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Appellant, citing United States ex rel. Johnson v. Chairman, ____F. 2d____ (2d Cir. 1974), slip op. no. 617, pp. 4127-4150, contends that the District Court erred in also dismissing the petition for failure to state a claim upon which relief could be granted.* There was no error. In Morrissey

* Application for certiorari No. 74-108 is pending.

v. Brewer, 408 U.S. 471 (1972) it was held that procedural due process applies to parole revocation proceedings. Morrissey was not construed as requiring any degree of due process in parole release proceedings until this Court's decision in Johnson. Both the Board's denial of parole in the present case and the District Court's decision antedated Johnson, and under the law as it existed prior to Johnson, the petition did not state a claim upon which relief could be granted. See United States ex rel. Johnson v. Chairman, supra (dissenting opinion); Menechino v. Oswald, 430 F. 2d 403 (2d Cir. 1970); Walker v. Oswald, 449 F. 2d 481 (2d Cir. 1971).

POINT III

THE PAROLE BOARD PLACED RELIANCE IN GOOD FAITH ON THE PRIOR LAW THAT A STATEMENT OF REASONS WAS NOT CONSTITUTIONALLY REQUIRED AND CONSIDERING THE BURDEN WHICH WOULD BE IMPOSED ON THE BOARD JOHNSON SHOULD NOT BE APPLIED RETROACTIVELY.

During 1972 the Board of Parole held a total of 8,288 regular parole hearings, 899 minimum date determination hearings and 3,687 minimum period hearings at State Correctional facilities. "Facts and Figures About The Activities of The Board of Parole and the Division of Parole and Community Services For the Year 1972", pp. 9-10. The 1973 "Facts and Figures" has not yet been issued, but we are advised that for the

year 1973 the Parole Board conducted 8,333 parole release hearings and 5,339 minimum period determination hearings in State Correctional facilities. Obviously in these release proceedings which antedated Johnson, the Board placed reliance in good faith on the prior law that a statement of reasons was not constitutionally required, and considering the burden which it would place on the Board, the decision should not be applied retroactively. As it was stated in Wolff v. McDonnell, _____U.S. _____, 41 L. Ed. 2d 935, 961 (1974):

> "The Court of Appeals held that the due process requirements in prison disciplinary proceedings were to apply retroactively so as to require that prison records containing determinations of misconduct, not in accord with required procedures, be expunged. We disagree and reverse on this point.
>
> The question of retroactivity of new procedural rules affecting inquiries into infractions of prison discipline is effectively foreclosed by this Court's ruling in Morrissey that the due process requirements there announced were to be 'applicable to future revocations of parole', 408 U.S. at 490, 33 L. Ed. 2d 484 (emphasis supplied). Despite the fact that procedures are related to the integrity of the fact-finding process, in the context of disciplinary proceedings, where less is generally at stake for an individual than at a criminal trial, great weight should be given to the significant impact a retroactivity ruling would have on the administration of all prisons in the country, and the reliance prison

officials placed, in good faith, on prior law not requiring such procedures. During 1973, the Federal Government alone conducted 19,000 misconduct hearings, as compared with 1,173 parole revocation hearings, and 2,023 probation revocation hearings. If Morrissey-Scarpelli rules are not retroactive out of consideration for burden on federal and state officials, this case is a fortiori. We also note that a contrary holding would be very troublesome for the parole system since performance in prison is often a relevant criteria for parole. On the whole, we do not think that error was so pervasive in the system under the old procedures to warrant this cost or result."

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE AFFIRMED.

Dated: New York, New York
September 24, 1974

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellees

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

BURTON HERMAN
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

BERNADETTE MERLINO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Appellees herein. On the 25th day of September , 1974 , she served the annexed upon the following named person :

RAYMOND FITZGERALD, ESQ.
200 Park Avenue
New York, N.Y. 10017

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Bernadette Merlino

Sworn to before me this
25th day of September , 1974

Burton Kerman
Assistant Attorney General
of the State of New York